

make the Nuclear Waste Storage Bill an early priority during the 106th Congress. More than 15 years ago, Congress directed the Department of Energy (DOE) to take responsibility for the disposal of nuclear waste created by commercial nuclear power plants and our nation's defense programs.

Today there are more than 100,000 tons of spent nuclear fuel that must be dealt with. One year has now passed since the DOE was absolutely obligated under the NWPA of 1982 to begin accepting spent nuclear fuel from utility sites, and DOE is no closer today in coming up with a solution. This is unacceptable. The law is clear, and DOE must meet its obligation. If the Department of Energy does not live up to its responsibility, Congress will act.

I am encouraged that the House of Representatives has begun to address this issue. A bill introduced by Representatives FRED UPTON and ED TOWNS of the House's Commerce Committee would set up a temporary storage site at Yucca Mountain, Nevada, for this waste until a permanent repository is approved and built. It is good to see bipartisan cosponsors for a safe, practical and workable solution for America's spent fuel storage needs. This solution is certainly more responsible than leaving waste at 105 separate power plants in 34 states across the nation. There are 29 sites which will reach capacity by the end of 1999. All of America's experience in waste management over the last twenty-five years of improving environmental protection has taught Congress that safe, effective waste handling practices entail centralized, permitted, and controlled facilities to gather and manage accumulated waste.

Mr. President, the management of used nuclear fuel should capitalize on this knowledge and experience. Nearly 100 communities have spent fuel sitting in their "backyard," and it needs to be moved. This lack of storage capacity could very possibly cause the closing of several nuclear power plants. These affected plants produce nearly 20% of the United States' electricity. Closing these plants just does not make sense.

Nuclear energy is a significant part of America's energy future, and must remain part of the energy mix. America needs nuclear power to maintain our secure, reliable, and affordable supplies of electricity at the same time the nation addresses increasingly stringent air quality requirements. Nuclear power is one of the best ways America can address those who say global warming is a problem—a subject I'll leave for another day.

Both the House and the Senate passed a bill in the 105th Congress to require the DOE to build this interim storage site in Nevada, but unfortunately this bill never completed the legislative process. I challenge my colleagues in both chambers of the 106th

Congress to get this environmental bill done. The citizens, in some 100 communities where fuel is stored today, challenge the Congress to act and get this bill done. This nuclear industry has already committed to the federal government about \$15 billion toward building the facility. In fact, the nuclear industry continues to pay about \$650 million a year in fees for storage of spent fuel. It is time for the federal government to live up to its commitment. It is time for the federal government to protect those 100 communities.

To ensure that the federal government meets its commitment to states and electricity consumers, the 106th Congress must mandate completion of this program—a program that includes temporary storage, a site for permanent disposal, and a transportation infrastructure to safely move used fuel from plants to the storage facility.

Mr. President, this federal foot dragging is unfortunate and unacceptable, so clearly the only remedy to stopping these continued delays is timely action in the 106th Congress on this legislation.●

#### RECOGNITION OF NATHAN SCHACHT

● Mr. GORTON. Mr. President, I rise today to commend and congratulate Nathan Schacht of Walla Walla, Washington, who was awarded the rank of Eagle Scout rank, the Boy Scout of America's highest honor, on January 19, 1999.

Nathan is the son of Don and Margaret Schacht and a sophomore at DeSales Catholic High School. He began scouting five years ago with the Eastgate Lions Troop 305 and moved onto the Cub Scout program with Pack 309.

Nathan and I share a common love for the outdoors. During his tenure with the Boy Scouts he logged over 70 miles of hiking and 70 miles of canoeing; earned the 50 Miler Afloat award; camped 63 nights and earned 31 merit badges. He recently completed his term as Senior Patrol Leader for Troop 305. He has been a member of the Order of the Arrow since 1996 and was awarded his Eagle Cap Credentials in 1997.

His Eagle project involved building a recycling center for Assumption Elementary School. He spent over 115 hours planning and carrying out this project which included contacting donors for the materials and working with the volunteers in all phases of the project. He secured over \$700 in donated materials and 261 hours of volunteer time.

Nathan also participates in other activities in his school and community. He participates in the football, basketball, and golf programs at DeSales High School, as well as band, drama and National Honor Society. He has served as a page in the Washington

State House of Representatives and as an altar server for the past seven years at Assumption Catholic Church.

I am confident that Nathan will continue to be a positive role model among his peers, a leader in his community and a friend to those in need. I extend my sincerest congratulations and best wishes to him. His achievement of Eagle Scout and significant contributions to the Walla Walla community are truly outstanding.●

#### ON THE MOTIONS TO OPEN TO THE PUBLIC THE FINAL DELIBERATIONS ON THE ARTICLES OF IMPEACHMENT

● Mr. LEAHY. In relation to the earlier vote, I have these thoughts. Accustomed as we and the American people are to having our proceedings in the Senate open to the public and subject to press coverage, the most striking prescription in the "Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials" has been the closed deliberations required on any question, motion and now on the final vote on the Articles of Impeachment.

The requirement of closed deliberation more than any other rule reflects the age in which the rules were originally adopted in 1868. Even in 1868, however, not everyone favored secrecy. During the trial of President Johnson, the senior Senator from Vermont, George F. Edmunds, moved to have the closed deliberations on the Articles transcribed and officially reported "in order that the world might know, without diminution or exaggeration, the reasons and views upon which we proceed to our judgment." [Cong. Globe Supp'l, Impeachment Trial of President Andrew Johnson, 40th Cong., 2d Sess., vol. 4, p. 424.] The motion was tabled.

In the 130 years that have passed since that time, the Senate has seen the advent of television in the Senate Chamber, instant communication and rapid news cycles, distribution of Senate documents over the Internet, the addition of 46 Senators representing 23 additional States, and the direct election of Senators by the people in our States.

Opening deliberations would help further the dual purposes of our rules to promote fairness and political accountability in the impeachment process. I supported the motion by Senators HARKIN, WELLSTONE and others to suspend this rule requiring closed deliberations and to open our deliberations on Senator BYRD's motion to dismiss and at other points earlier in this trial. We were unsuccessful. Now that we are approaching our final deliberations on the Articles of Impeachment, themselves, I hope that this secrecy rule will be suspended so that the Senate's deliberations are open and the American people can see them. In a matter

of this historic importance, the American people should be able to witness their Senators' deliberations.

Some have indicated objection to opening our final deliberations because petit juries in courts of law conduct their deliberations in secret. Analogies to juries in courts of law are misplaced. I was privileged to serve as a prosecutor for eight years before I was elected to the Senate. As a prosecutor, I represented the people of Vermont in court and before juries on numerous occasions. I fully appreciate the traditions and importance of allowing jurors to deliberate and make their decisions privately, without intrusion or pressure from the parties, the judge or the public. The sanctity of the jury deliberation room ensures the integrity and fairness of our judicial system.

The Senate sitting as an impeachment court is unlike any jury in any civil or criminal case. A jury in a court of law is chosen specifically because the jurors have no connection or relation to the parties or their lawyers and no familiarity with the allegations. Keeping the deliberations of regular juries secret ensures that as they reach their final decision, they are free from outside influences or pressure.

As the Chief Justice made clear on the third day of the impeachment trial, the Senate is more than a jury; it is a court. Courts are called upon to explain the reasons for decisions.

Furthermore, to the extent the Senate is called upon to evaluate the evidence as is a jury, we stand in different shoes than any juror in a court of law. We all know many of the people who have been witnesses in this matter; we all know the Republican Managers—indeed, one Senator is a brother of one of the Managers; and we were familiar with the underlying allegations in this case before the Republican Managers ever began their presentation.

Because we are a different sort of jury, we shoulder a heavier burden in explaining the reasons for the decisions we make here. I appreciate why Senators would want to have certain of our deliberations in closed session: to avoid embarrassment to and protect the privacy of persons who may be discussed. Yet, on the critical decisions we are now being called upon to make our votes on the Articles themselves, allowing our deliberations to be open to the public helps assure the American people that the decisions we make are for the right reasons.

In 1974, when the Senate was preparing itself for the anticipated impeachment trial of former President Richard Nixon, the Committee on Rules and Administration discussed the issue of allowing television coverage of the Senate trial. Such coverage did not become routine in the Senate until later in 1986. In urging such coverage of the possible impeachment trial of President Nixon, Senator Metcalf (D-MT), explained:

Given the fact that the party not in control of the White House is the majority party in the Senate, the need for broadcast media access is even more compelling. Charges of a 'kangaroo court,' or a 'lynch mob proceeding' must not be given an opportunity to gain any credence whatsoever. Americans must be able to see for themselves what is occurring. An impeachment trial must not be perceived by the public as a mysterious process, filtered through the perceptions of third parties. The procedure whereby the individual elected to the most powerful office in the world can be lawfully removed must command the highest possible level of acceptance from the electorate." (Hrg. August 5 and 6, 1974, p. 37).

Opening deliberation will ensure complete and accurate public understanding of the proceedings and the reasons for the decisions we make here. Opening our deliberations on our votes on the Articles would tell the American people why each of us voted the way we did.

The last time this issue was actually taken up and voted on by the Senate was more than a century ago in 1876, during the impeachment trial of Secretary of War William Belknap. Without debate or deliberation, the Senate refused then to open the deliberations of the Senate to the public. That was before Senators were elected directly by the people of their State, that was before the Freedom of Information Act confirmed the right of the people to see how government decisions are made. Keeping closed our deliberations is wholly inconsistent with the progress we have made over the last century to make our government more accountable to the people.

Constitutional scholar Michael Gerhardt noted in his important book, "The Federal Impeachment Process," that "the Senate is ideally suited for balancing the tasks of making policy and finding facts (as required in impeachment trials) with political accountability." Public access to the reasons each Senator gives for his vote on the Articles is vital for the political accountability that is the hallmark of our role.

I likewise urge the Senate to adjust these 130-year-old rules to allow the Senate's votes on the Articles of Impeachment to be recorded for history by news photographers. This is a momentous official and public event in the annals of the Senate and in the history of the nation. This is a moment of history that should be documented for both its contemporary and its lasting significance.

Open deliberation ensures complete accountability to the American people. Charles Black wrote that presidential impeachment "unseats the person the people have deliberately chosen for the office." "Impeachment: A Handbook," at 17. The American people must be able to judge if their elected representatives have chosen for or against conviction for reasons they understand, even if they disagree. To bar the Amer-

ican people from observing the deliberations that result in these important decisions is unfair and undemocratic.

The Senate should have suspended the rules so that our deliberations on the final question of whether to convict the President of these Articles of Impeachment were held in open session.

I ask that following my remarks a copy of the Application of Cable News Network, submitted by Floyd Abrams and others, be printed in the RECORD.

The material follows:

IN THE U.S. SENATE SITTING AS A  
COURT OF IMPEACHMENT

In re

IMPEACHMENT OF WILLIAM JEFFERSON  
CLINTON, PRESIDENT OF THE UNITED STATES

APPLICATION OF CABLE NEWS NETWORK FOR A  
DETERMINATION THAT THE CLOSURE OF THESE  
PROCEEDINGS VIOLATES THE FIRST AMENDMENT  
TO THE UNITED STATES CONSTITUTION

To: The Honorable William H. Rehnquist and  
The Honorable Members of the U.S. Senate

Cable News Network ("CNN") respectfully submits this application for a determination that the First Amendment to the United States Constitution requires that the public be permitted to attend and view the debates, deliberations and proceedings of the United States Senate as to the issue of whether President William Jefferson Clinton shall be convicted and as to other related matters.

INTRODUCTION

Under Rules VII, XX and XXIV of the "Rules of Procedure and Practice in the Senate When Sitting On Impeachment Trials," the Senate has determined to sit in closed session during its consideration of various issues that have arisen during these impeachment proceedings. Motions to suspend the rules have failed and the debates among members of the Senate as to a number of significant matters have been closed. As the final debates and deliberations approach at which each member of the Senate will voice his or her views on the issue of whether President Clinton should be convicted or acquitted of the charges made, the need for the closest, most intense public scrutiny of the proceedings in this body increases. By this application, CNN seeks access for the public to observe those debates, as well as other proceedings that bear upon the resolution of the impeachment trial. The basis of this application is the First Amendment to the Constitution of the United States.

We make this application mindful that deliberations upon impeachment were conducted behind "closed doors" at the last impeachment trial of a President, in 1868. We are, as well, mindful of the power of the Senate—consistent with the power conferred upon it in Article I, Section 3 of the Constitution—to exercise full control over the conduct of impeachment proceedings held before it. In so doing, however, the Senate must itself be mindful of its unavoidable responsibility to adopt rules and procedures consistent with the entirety of the Constitution as it is now understood and as the Supreme Court has interpreted it.

The commands of the First Amendment, we urge, are at war with closed-door impeachment deliberations. If there is one principle at the core of the First Amendment it is that, as Madison wrote, "the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress, p. 934 (1794). That proposition in turn is rooted in the expectation that citizens—the people—will have the information that enables them to judge government and those in government. The right and ability of citizens to obtain the information necessary for self-government is indeed at the heart of the Republic itself: "a people who mean to be their own Governors," Madison also wrote, "must arm themselves with the power which knowledge gives." James Madison, Letter to W.T. Barry, in 9 Writings of James Madison 103 (G. Hunt ed., 1910). As Chief Justice Warren Burger observed, writing for the Supreme Court in 1980 in one of its many recent rulings vindicating the principle of open government: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Those very words could well have been written about the proceedings before the Senate today.

All agree that the impeachment of a President presents the most solemn question of self-government that a free society can ever confront. All should also agree that the public ought to have the most complete information about each decision made by the body responsible for ruling upon that impeachment. Should the Senate vote to convict, a President duly elected twice by the public will be removed from office. Does not a self-governing public have the most powerful interest in being informed about every aspect of that decision and why it was taken? Should the Senate vote to acquit, the President will not be removed in the face of impeachment proceedings in which the majority in the House branded him a criminal. Can it seriously be doubted that the public possesses just as profound a right to know why?

Only recently—and only during this century (and well after the trial of Andrew Johnson)—has our commitment to the principle that debate on public issues should be open become not merely a nationally shared philosophy but an element embedded in constitutional law as well. But deeply-rooted in the law it has become. It is thus no answer to observe that impeachment deliberations in the Senate were closed in the nineteenth century. The Senate has a duty to consider the transformation of First Amendment principles since that time in determining whether it is now constitutionally permissible to close impeachment deliberations on the eve of the twenty-first century. If, as is also true, the Senate, rather than the Supreme Court, was chosen to try impeachments precisely because its members are "the representatives of the nation," Federalist No. 65, and as such possess a greater "degree of credit and authority" than the Supreme Court to carry out the task of determining the fate of a President,<sup>1</sup> that "credit and authority" can only be brought to bear if the process by which judgment is reached is open to the public.

#### THE OBLIGATION OF CONGRESS TO ACCOUNT FOR AND ABIDE BY THE FIRST AMENDMENT

As we have said, we are mindful of the language of Article I, Section 3, according the Senate the "sole Power to try all Impeachments." See *Nixon v. United States*, 506 U.S.

224 (1993) (according the Senate broad discretion to choose impeachment procedures). But this very delegation of authority to the Senate, a delegation that makes most issues concerning impeachment rules "non-justiciable", see *Nixon, supra*, also imposes on this body a very special responsibility to ensure that those rules comply with constitutional mandates.<sup>2</sup> Congress itself—the very entity against which the First Amendment affords the most explicit protection<sup>3</sup>—is bound to abide by the First Amendment. The Constitution is "the supreme Law of the Land," U.S. Const., art. VI, para. 2, and all "Senators and Representatives . . . shall be bound by Oath or Affirmation, to support" it. *Id.* para. 3. The Supreme Court has repeatedly recognized that Congress is itself obligated to interpret the Constitution in exercising its authority. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("Congress is a co-equal branch of government whose Members take the same oath we do to uphold the Constitution of the United States."). And in promulgating its rules the Congress must, of course, abide by the Constitution: "The constitution empowers each house to determine its rules and proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights. . . ." *United States v. Ballin*, 144 U.S. 1, 5 (1892), quoted in *Consumers Union of United States, Inc. v. Periodical Correspondents' Assoc.*, 515 F.2d 1341, 1347 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051 (1976); see *Watkins v. United States*, 354 U.S. 178, 188 (1957).

#### THE COMMAND OF THE FIRST AMENDMENT

The architecture of free speech law—and, in particular, that law placed in the context of access to information as to how and why government power is being exercised—could not more strongly favor the broadest dissemination of information about, and comment on, government. The foundation of the First Amendment is, in fact, our republican form of government itself. As the Supreme Court recognized in the landmark free speech decision, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964): ". . . the Constitution created a form of government under which '[t]he people, not the government possess the absolute sovereignty.' The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects." *Id.* at 274 (quoting Reporting of the General Assembly of Virginia, 4 Elliot's Debates). In *Sullivan*, a unanimous Court determined that the "altogether different" form of government ratified by the Founders necessitated an altogether "different degree of freedom" as to political debate than had existed in England. *Id.* at 275 (citation omitted). It was in the First Amendment that this unique freedom was enshrined and protected.

For the Court, the "central meaning of the First Amendment," 376 U.S. at 273, was the "right of free public discussion of the stewardship of public officials. . . ." *Id.* at 275. Thus, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369. *Id.* at 269.<sup>4</sup>

The decision in *Sullivan* related specifically to libel law. But what made *Sullivan* so transformative—what made it, as the eminent First Amendment scholar Alexander Meiklejohn remarked, cause for "dancing in the streets"<sup>5</sup>—was this: it recognized (in Madison's words) that "[t]he people, not the government, possess the absolute sovereignty." *Sullivan*, 376 U.S. at 274. It emphasized that the First Amendment protected the "citizen-critic" of government. *Id.* at 282. It barred government itself from seeking damages from insults directed at it by its citizens. And it declared that "public discussion is a political duty." *Id.* at 270.

In the decades following *Sullivan*, these notions became embedded in the First Amendment—and thus the rule of law—through dozens of rulings of the Supreme Court. In particular, and following from, the First Amendment protection of public discussion is the right of the public to receive information about government. The First Amendment is not merely a bar on the affirmative suppression of speech; as Chief Justice Rehnquist has observed, "censorship . . . as often as not is exercised not merely by forbidding the printing of information in the possession of a correspondent, but in denying him access to places where he might obtain such information." William H. Rehnquist, "The First Amendment: Freedom, Philosophy, and the Law," 12 Gonz. L. Rev. 1, 17 (1976).

And, indeed, the Supreme Court has repeatedly affirmed Chief Justice Rehnquist's insight. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Accord Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'").

The Supreme Court has thus ruled on four occasions that the First Amendment creates a right for the public to attend and observe criminal trials and related judicial proceedings, absent the most extraordinary of circumstances. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). The cases are particularly relevant to this application because they—perhaps more clearly than any others—illustrate the core constitutional principle that government may not arbitrarily foreclose the opportunity for citizens to obtain information central to the decisions they make—and the judgments they render—about government itself.

The teaching of this quartet of cases was aptly articulated by another Chief Justice, Warren Burger, writing for the Court in *Richmond Newspapers*, the first of the four decisions. The First Amendment, he wrote, "assur[es] freedom of communication on matters relating to the functioning of government." 448 U.S. at 575. Noting the centrality of the openness in which trials were conducted to that end, *id.* at 575, the Court stated that openness was an "indispensable attribute of an Anglo-American trial." *Id.* at 569. It had assured that proceedings were conducted fairly, and it had "discouraged perjury, the misconduct of participants, and decisions based on secret bias". *Id.* Most significantly, open trials had provided public acceptance of and support for the entire judicial process. It was with respect to this benefit of openness—the legitimacy it provides

to the actions of government itself—that Chief Justice Burger (in the passage quoted above), observed that “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them at accept what they are prohibited from observing.” *Id.* at 562.<sup>6</sup>

To be sure, the Chief Justice in *Richmond Newspapers* rested heavily on the tradition of openness of criminal trials themselves—a difference of potential relevance because impeachment debates and deliberation have historically been conducted in secret. But, taken together, *Richmond Newspapers* and its progeny stand for propositions far broader than the constitutional value of any specific historical practice. The sheer range of proceedings endorsed as open by the Supreme Court suggests the importance under the First Amendment of public observation of the act of doing justice. Moreover, Supreme Court precedent itself suggests that the crucial right to see justice done prevails even where the specific kind of proceeding at issue had a history of being closed to the public. In *Globe Newspaper Co.*, the Court ruled that the First Amendment barred government from closing of trials of sexual offenses involving minor victims. It did so despite the “long history of exclusion of the public from trials involving sexual assaults, particularly those against minors.” 457 U.S. at 614 (Burger, C.J., dissenting).

*New York Times Co. v. Sullivan* and *Richmond Newspapers* have significance which sweep far beyond their holdings that debate about public figures must be open and robust and that trials must be accessible to the public. Both cases—and all the later cases they have spawned—are about the centrality of openness to the process of self-governance. “[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole. . . . And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government.” *Globe Newspaper Co.*, 457 U.S. at 606.

The First Amendment principles set forth above lead inexorably to a straightforward conclusion: the Senate should determine as a matter of First Amendment law that the public may attend and observe its debates and deliberations about the impeachment of President Clinton. No issue relates more to self-government. No determinations will have more impact on the public. No judgment of the Senate should be subject to more—and more informed—public scrutiny.

We are well aware that it is sometimes easier to be subjected to less public scrutiny and that some have the perception (which has sometimes proved accurate) that more can be accomplished more quickly in secret than in public. But this is, at its core, an argument against democracy itself, against the notion that it is the public itself which should sit in judgment on the performance of this body. It is nothing less than a rejection of the First Amendment itself. What Justice Brennan said two decades ago in the context of judicial proceedings is just as applicable here: “Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute

to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

That it is the tradition of this body to conduct impeachment deliberations in closed session is not irrelevant. But neither should it be governing. The Senate has, after all, conducted only one presidential impeachment trial before this one. Our society in 1868—and, more significantly still, our law in 1868—was far different than it is today. As we have demonstrated, First Amendment jurisprudence as we know it—as it governs us and binds the Senate—is essentially a creature of the twentieth century. That jurisprudence assures public scrutiny, not public ignorance.

There are, to be sure, certain limited instances when closure of Senate deliberations may serve useful purposes, such as when they involve disclosure of matters of national security. But no such concerns are present here. And however proper it may be to analogize the Senate in some ways to a jury, none of the considerations that permits juries to deliberate out of the public eye are present here. The identities of the “jurors” here are well known, as, under the Senate rules, will be how each one voted. The Constitution does not offer protection to the “jurors” here from the force of public opinion for their votes for or against the conviction of President Clinton. They will face the full weight of public approval or rejection the next time they seek re-election. The Constitution does require that the reasons they give for their votes and other statements made in the course of debate be made in public so that both the debate and the votes themselves can be assessed by the people—the ultimate “Governors” in this republic.

#### CONCLUSION

From the time these proceedings commenced in the House of Representatives through the submission of this application, members of the Congress have repeatedly—and undoubtedly correctly—referred to the weighty constitutional obligations imposed upon them by this process. This application focuses on yet another constitutional obligation of the members of the Senate, an obligation reflected in the oath of office itself. It is that of adhering to the First Amendment. We urge the Senate to do so by permitting the public to observe its deliberations.

Dated: New York, NY, January 29, 1999.

Respectfully submitted,

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#### FOOTNOTES

<sup>1</sup>Federalist No. 65; see *Nixon v. United States*, 506 U.S. 224, 233-34 (1993).

<sup>2</sup>It is precisely because the Senate possesses this power over its own rules that this application is made to the Senate rather than to any court.

<sup>3</sup>“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”

<sup>4</sup>See Thomas Emerson, *The System of Freedom of Expression* 7 (1970); John Hart Ely, *Democracy and Distrust* 93-94 (1980); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 23 (1971); see generally Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

<sup>5</sup>Harry Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 Supp. Ct. Rev. 191, 211 n. 125.

<sup>6</sup>The right of the public and the press to have access “to news or information concerning the operations and activities of government,” a right predicated in part on the principles set forth in cases such as *Richmond Newspapers* and its progeny, has been recognized in a variety of contexts outside the courtroom. *Cable News Network, Inc. v. American Broadcasting Companies, Inc.*, 518 F. Supp. 1238, 1243 (N.D. Ga. 1981) (court enjoins Executive’s expulsion of television networks from press travel pool covering the President); see also *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977) (court requires White House to publish standards for denying press accreditation on security grounds).●

#### IMPEACHMENT TRIAL—FINDINGS OF FACT PROPOSALS

● Mr. FEINGOLD. Mr. President, on January 28, I was the only Democratic senator to cross party lines and oppose the motion to dismiss. I felt it would be unwise to end this trial prior to a more complete presentation of evidence and a final vote on the Articles of Impeachment themselves. Nonetheless, I had no doubt that a motion to dismiss was a constitutional way to end the trial, if a majority of senators had supported the motion.

The Senate must keep in mind at every step in this process that our actions will be scrutinized not just by our constituents today and for the rest of the trial, but also by history. If another impeachment trial should occur 130 years from now, the record of this trial will serve as an important precedent for the Senate as it determines how to proceed. It is our responsibility to abide by the Constitution as closely as possible throughout the remainder of this trial. My votes on House Managers’ motions on February 4 were based on the same concerns about prudence and precedent that motivated my earlier votes on the motion to dismiss and calling witnesses.

With the judgment of history awaiting us, I did have serious concerns about the constitutionality of proposals that the Senate should adopt so-called “Findings of Fact” before the Senate votes on the Articles of Impeachment themselves. It now appears that support for such proposals has waned, and the Senate will not be called upon to vote on them. Nonetheless, I want to explain my opposition to such proposals for the record.

Findings of Fact would allow a simple 51 vote majority of the Senate to state the judgment of the Senate on the facts of this case and, in effect, to determine the President’s “guilt” of the crimes alleged in the Articles. But the Constitution specifically requires that two-thirds of the Senate must convict the President on the Articles in order to impose any sanction on